Supreme Court, U.S.
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No. 00-1310

In the Supreme Court of the United States

BRIAN B., BY AND THROUGH HIS MOTHER, LOIS B., ET AL.,
Petitioners

v.

EUGENE HICKOK,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals correctly held that petitioners were not likely to succeed in their equal protection challenge to a provision of the Pennsylvania School Code, which treats convicted juveniles offenders confined in local correctional facilities the same as students who have been expelled from the public schools?

PARTIES TO THE PROCEEDING

The caption used by the petitioners does not accurately reflect the parties in this Court. The petitioners are Brian B., Abdul R., Byron A., Ronelle W., Steven S., Anthony T., Kenneth R. and Jeremiah M., who sue on their own behalf and on behalf of a class.

The respondent is the Secretary of the Pennsylvania Department of Education, Eugene W. Hickok.

In the District Court, the petitioners also named as a defendant the Pennsylvania Department of Education, but later conceded that the Department, because of its Eleventh Amendment immunity, was not a proper defendant. *See* appendix to the petition ("Pet. App.") at 38a-39a & n.6. Three Pennsylvania school districts — Garnet Valley, Philadelphia and Central York — were also defendants in the District Court, but did not participate in the proceedings in the Court of Appeals.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 230 F.3d 582 and is reprinted at Pet. App. 5a-30a. The opinion of the District Court is reported at 51 F.Supp.2d 611 and is reprinted at Pet. App. 31a-87a.

STATEMENT OF JURISDICTION

The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on October 12, 2000. Petitioners filed a timely request for rehearing which was denied on November 8, 2000, and filed their petition within 90 days thereafter, on February 6, 2001.

CONSTITUTIONAL, STATUTORY AND ADMINISTRATIVE PROVISIONS INVOLVED

1. The Fourteenth Amendment to the Constitution provides in relevant part that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST., Amend. XIV, § 1.

2. Section 1306.2(a) of the Pennsylvania School Code provides in relevant part as follows:

> A person under twenty-one (21) years of age who is confined to an adult local correctional institution following conviction for a criminal offense who is otherwise eligible for educational services as provided under this act shall be eligible to receive educational services from the board of school directors in the same manner and

> to the same extent as a student who has been expelled [for misconduct].

Pa. Stat. Ann., tit. 24, § 13-1306.2(a) (Purdon 2000 Supp.).

3. The regulations of the Pennsylvania Department of Education provide in relevant part as follows:

> Students who are less than 17 years of age are still subject to the compulsory school law attendance law even though expelled, and they must be provided an education. ... The initial responsibility for providing the required education rests with the student's parents or guardian. ... If the parents or guardian are unable to provide for the required education ... the [school] district must make some provision for the student's education.

22 Pa.Code § 12.6(e).

STATEMENT OF THE CASE

This petition arises out of an unsuccessful attempt to obtain a preliminary injunction against a provision of the Pennsylvania School Code. Petitioners are a class of juveniles between the ages of 14 and 21, who have been convicted of crimes and are serving their sentences in county jails. The respondent is the Secretary of the Pennsylvania Department of Education. Petitioners filed this action pursuant to 42 U.S.C. § 1983, seeking declaratory and injunctive relief.

1. Under Pennsylvania's sentencing law, a person sentenced to a maximum term of less than two years serves it in

a county jail; a person sentenced to five years or more serves it in a state prison; and a person sentenced to two or more but less than five years may be committed to either a state or county facility, at the discretion of the sentencing court. *See* Pa. Stat. Ann., tit. 42, § 9762 (Purdon 1998). In 1995, Pennsylvania's General Assembly expanded the categories of crimes for which a juvenile aged 14 or over could be tried as an adult, including for the first time a number of crimes which can result in a sentence of less than two years. Pet. App. 77a n.30; *see* Pa. Stat. Ann., tit. 42, § 6302 (definition of "delinquent act") (Purdon 2000), *as amended by* Act 1995, No. 33.[1] Anticipating that this would produce a significant increase in the number of 14-to-20 year old juveniles confined in county jails, the legislature then enacted Section 1306.2 of the Pennsylvania School Code, including the provision challenged in this case. *See* Pa. Stat. Ann., tit. 24, § 13-1306.2 (Purdon 2000 Supp.).

Before the enactment of Section 1306.2, juveniles imprisoned in county jails generally received no educational services. Pet. App. 35a. Section 1306.2(a), the provision challenged in this case, now provides that convicted juveniles who are serving sentences in county jails are entitled to the same educational services as students who have been expelled from the public schools for misconduct. The regulations of the Pennsylvania Department of Education in turn provide that expelled students who are under the age of 17 are entitled to have "some provision" made for their education. *See* 22 Pa. Code §

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[1]Before this, juveniles between the ages of 14 and 21 could be tried as adults only for murder. Act 33 added to this the crimes of rape, involuntary deviate sexual intercourse, aggravated assault, robbery, robbery of a motor vehicle, aggravated indecent assault, kidnapping, voluntary manslaughter, and attempt, conspiracy or solicitation to do any of them.

12.6(e). The amount and type of instruction provided to these students is largely left to the discretion of local school districts, Pet. App. 42a, *citing Abremski v. Southeastern Sch. Dist. Bd. of Directors*, 421 A.2d 485 (Pa.Cmwlth. 1980), but the District Court found that school districts routinely provide them with five hours of instruction per week. Pet. App. 43a. Expelled students 17 years of age or more — who are not subject to compulsory school attendance — are not entitled to receive further educational services. Pet. App. 42a, *citing* Pa. Stat. Ann., tit. 24, §§ 13-1326 and 13-1327 (Purdon 1992).

Section 1306.2(a) does not apply to juveniles who are pretrial detainees,[2] or who are convicted and imprisoned in state prisons, or who are confined to juvenile facilities as delinquents.[3] In addition, the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*, requires Pennsylvania to provide a free appropriate education to students who fall within its coverage, whether or not they are imprisoned on county jails. Pet. App. 44a-45a.

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[2]Section 1306.2(b) provides for pretrial detainees to receive the same educational services as "disruptive students," — an alternative program which may operate outside the day and hour requirements of the ordinary school program, while still permitting students to fulfill the requirements for graduation. *See* Pet. App. 44a n.9

[3]Juveniles in state prisons or juvenile facilities receive full-time schooling, which at the high school level in Pennsylvania comprises 27.5 hours of instruction per week and 180 days of instruction per year. Pet. App. 42a, *citing* Pa. Stat. Ann., tit. 24, § 15-1504 (Purdon 1992).

2. Petitioners brought this action in the District Court pursuant to 42 U.S.C. § 1983, claiming that the distinction drawn by Section 1306.2(a) between juveniles confined in county jails, and juveniles confined in state prisons or juvenile facilities, violates the Fourteenth Amendment's Equal Protection Clause. Eventually, they moved for a preliminary injunction against the enforcement of the statute, but the District Court denied their request.

The District Court first rejected the petitioners' argument that *Plyler v. Doe*, 457 U.S. 202 (1982), required that the statute be subjected to heightened scrutiny under the Equal Protection Clause, concluding instead that the more deferential rational basis standard was appropriate. Pet. App. 49a-71a. Applying this standard to Section 1306.2(a), the District Court agreed with the respondent that providing educational services in county jails was "more difficult, more expensive and more burdensome" than providing those same services in state prisons, for several reasons. Pet. App. 71a (internal quotation marks omitted).

First, most state prisons have more space which can be devoted to educational programs than do most county jails; in some counties, space constraints are so severe that educational programs could be afforded only by displacing other programs such as drug and alcohol counseling, mental health counseling, parole review, disciplinary hearings, and recreation. Pet. App. 73a-76a. Second, state prisons have larger juvenile populations, on average, than do county jails, allowing them to take advantage of economies of scale which produce lower per-pupil costs; this is true as well of juvenile detention facilities. Pet. App. 76a-77a. Third, the juvenile population in state prisons is, on average, serving longer sentences than is the relatively transient population in county jails; state prisoners are thus less likely to be released before age 21 (while they are still eligible to resume

ordinary schooling), and more likely to benefit from prison educational programs. Pet. App. 80a-81a.

Thus, while the District Court had "doubt[s]" about the "utility" of the policy embodied in Section 1306.2(a), Pet. App. 86a, he was "constrained to conclude that [it] must ... be described as 'rational.'" Pet. App. 83a. He therefore held that petitioners were not likely to succeed on the merits of their challenge, and denied the preliminary injunction. Pet. App. 84a.

2. On petitioner's interlocutory appeal, the Court of Appeals affirmed the District Court's denial of the preliminary injunction. Like the District Court, the Court of Appeals rejected petitioners' call to apply a heightened standard of scrutiny based on *Plyler v. Doe, supra*. The Court of Appeals noted that this Court "has declined to extend *Plyler's* heightened scrutiny to other education cases," Pet. App. 11a, and indeed has not extended *Plyler* at all "'beyond the unique circumstances that provoked its unique confluence of theories and rationales.'" *Ibid*, 11a, *quoting Kadrmas v. Dickinson Pub. Schools*, 487 U.S. 450, 459 (1988) (internal quotation marks omitted). The Court of Appeals, applying rational basis review, held that Section 1306.2 was likely constitutional, largely for the same reasons articulated by the District Court, Pet. App. 12-15a,[4] and that petitioners had therefore not shown a reasonable probability of success on the merits. Pet. App. 16a.

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[4]In addition to the three rational bases accepted by the District Court, the Court of Appeals found persuasive a fourth consideration: that discontinuing educational programs in state prisons where they already existed would raise security concerns, while merely failing to extend those programs to county jails, where they had never existed, would not. Pet. App. 14a.

One judge dissented. The dissenting judge agreed with the majority that "the proper standard of review for this case is rational basis scrutiny," Pet. App. 16a, but would have held that petitioners had demonstrated a likelihood that the statute would not survive such review. Pet. App. 16a-30a.

The Court of Appeals denied rehearing and rehearing en banc, with one judge dissenting. Pet. App. 2a.

REASONS FOR DENYING THE WRIT

Petitioners' preliminary injunction motion was correctly decided by the routine application of well-established principles of law.

In the District Court and in the Court of Appeals, petitioners consistently argued that their equal protection challenge should be decided under the heightened scrutiny standard of *Plyler v. Doe, supra*. *See* Pet. App. 9a, 60a. It is not clear, however, whether they maintain that position in this Court. In a confused and confusing discussion, petitioners seem sometimes to adhere to *Plyler*, *see* Pet. 19; sometimes to embrace a level of scrutiny which they call a "more searching rational basis review," Pet. 20, and which appears to fall somewhere between traditional rational basis review and heightened scrutiny; and sometimes to argue simply that the courts below misapplied traditional rational basis review. Pet. 15-16.

However that may be, the fact remains that the Court has addressed on several occasions the proper application of equal protection principles to claims involving education. *See, e.g., San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Plyler v. Doe, supra*; *Papasan v. Allain*, 478 U.S. 265 (1986); *Kadrmas*

v. Dickinson Pub. Schools, supra. The Court "[has not] accepted the proposition that education is a 'fundamental right' ... which should trigger strict scrutiny," *Kadrmas*, 487 U.S. at 458; and in the absence of discrimination against a suspect class,[5] the Court has therefore generally applied rational basis scrutiny when such statutes are challenged.

The exception, of course, is *Plyler's* application of heightened scrutiny to invalidate a law which completely denied any education to the children of illegal aliens. *Id.*, 457 U.S. at 217-18. As the Court made clear in *Kadrmas*, however, the Court has "not extended [*Plyler's*] holding beyond the unique circumstances that provoked its unique confluence of theories and rationales," *Kadrmas*, 487 U.S. at 459 (internal quotation marks omitted);[6] and the general rule remains that statutes involving education, like other social or economic legislation, will be upheld "so long as the challenged classification is rationally related to a legitimate governmental purpose." *Id.*, at 457-58. This case thus presents no novel or unsettled issues for the Court. *See id.*, 487 U.S. at 452 (Court resolves case by "[a]pplying well-established equal protection principles").

Nor have petitioners pointed to any confusion among the lower courts on the proper standard for reviewing claims such as theirs. All of the judges in the courts below, including the dissenting judge in the Court of Appeals, Pet. App. 16a, agreed that rational basis review provided the proper means for analyzing petitioners' challenge, and petitioners have made no

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[5]*See, e.g., Brown v. Bd. of Education*, 347 U.S. 483 (1954).

[6]As both of the lower courts pointed out, the facts of this case are quite unlike those of *Plyler*. *See* Pet. App. 11a, 70a.

real attempt to demonstrate any conflict with the decisions of other courts. Petitioners' only effort in this direction comes in a footnote, in which they say that the Third Circuit's "refusal to apply heightened scrutiny" is "at odds" with a sixteen-year old case from the Eighth Circuit. Pet. 19 n.20, *citing Horton v. Marshall Pub. Schools*, 769 F.2d 1323 (8th Cir. 1985). But even this "conflict" is illusory. *Horton* was decided before the guidance provided by the Court in *Kadrmas*; and a later decision by the Eighth Circuit, citing *Kadrmas*, applied rational basis analysis to uphold a classification at least somewhat similar to that challenged here. *See Felton v. Fayette Sch. Dist.*, 875 F.2d 191, 193 (8th Cir. 1989) (upholding decision to exclude from vocational education program student involved in theft of auto parts). Whatever uncertainty might once have existed about the reach of *Plyler* was thus resolved by *Kadrmas*, and there is no need for the Court to go over this ground again.

In the end, then, petitioners are reduced to complaining that the lower courts misapplied the rational basis standard to the facts of this case. *See* Pet. 15-16, 25-28. Petitioners, understandably, simply disagree with the outcome of their motion. Disagreements over the application of "well-established principles" *Kadrmas*, 487 U.S. at 452, to the specific facts of a given case, however, do not justify this Court's discretionary review.

CONCLUSION

The Court should deny the petition.

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